IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES BLAIR,

Appellant,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, ROBERT A. HEINZE, WARDEN, et al.,

Appellees.

No. 18,949

APPELLEES' BRIEF

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JURISDICTIONAL STATEMENT

Appellant, a California state prisoner, filed a motion in the United States District Court for the Northern District of California, Northern Division, seeking leave to file, in forma pauperis, an application for a writ of habeas corpus pursuant to Title 28 U.S.C. Section 2241. The District Court denied the writ on its merits on August 29, 1962, and the District Court also denied appellant's application for a certificate of probable cause on December 3, 1962.

Appellant filed a notice of appeal in propria persona with this Court on or about September 27, 1962. On March 7, 1963, counsel was appointed to represent appellant in this Court. Counsel prepared and filed an application for a certificate of probable cause on

July 19, 1963. The Court entered its order on July 23, 1963, granting a certificate of probable cause for appeal from the district court's denial of the petition for writ of habeas corpus.

STATEMENT OF THE CASE

It was alleged, among other things, in the petition for habeas corpus that appellant's state court conviction was void because appellant was not represented by counsel at the time the indictment was amended to show appellant's true first name.

The state court judgment resulted from appellant's conviction of the sale of marijuana in violation of section 11531 of the Health and Safety Code with two prior felony convictions. The judgment was affirmed on appeal by the Second District Court of Appeal of the State of California on August 18, 1961, and is reported in People v. Blair, 195 Cal.App.2d 1, 15 Cal. Rptr. 533. A petition for rehearing was denied September 1, 1961, and appellant's petition for a hearing by the California Supreme Court was denied October 11, 1961. Certiorari was denied on February 26, 1962 (Blair v. California, 369 U.S. 807, 7 L.Ed.2d 554, 82 S.Ct. 651).

Appellant filed a petition for a writ of habeas corpus with the California Supreme Court on April 17, 1961, alleging that he was then being denied

access to the courts, and that the trial records of his conviction had been confiscated by the warden of Folsom State Prison. The petition was denied on May 24, 1961. A petition for certiorari was denied December 4, 1961 (Blair v. California, 369 U.S. 807, 7 L.Ed 2d 554, 82 S Ct 651).

Appellant filed a petition for habeas corpus in the Superior Court of the State of California, in and for the County of Sacramento, on January 23, 1962, wherein the allegations were substantially similar to those in the present case. This petition was denied February 19, 1962.

STATEMENT OF FACTS

The facts as set forth in respondent's brief in People v. Blair, 195 Cal App 2d 1, 15 Cal Rptr. 533, are as follows:*

> "On November 13, 1959 Officer Willie Tusan, Jr., who had been assigned to the Narcotics Division of the Los Angeles police force from July 27, 1959 to March 1, 1960, was riding with Ernest Hammond, an informer who worked with Officer Tusan. At approximately 2:55 P.M. they drove past the southwest corner of Fifth and Crocker. The informer called to the appellant, who was standing near the corner of

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* The Clerk's and Reporter's Transcripts of the state trial court are lodged with the Court. Appellant lodged these records with the court below (see page 22 of petition).

Fifth and Crocker. (Rep. Tr. pp 25-27.) Officer Tusan parked the car down the street near the corner and in a few minutes the appellant and another person walked up to the car and got into the back seat. The other person later turned out to be a person with a nickname of 'Blood'. (Rep. Tr. p. 27.) The informer asked appellant if he was ready to go, to which appellant stated that he was. 'Blood' told him and Officer Tusan to drive to 23rd and San Pedro Streets. (Rep. Tr. p. 28.) As they drove toward 23rd and San Pedro, appellant asked Officer Tusan how many 'joints' he wanted to buy. To a narcotics seller or user, a 'joint' signifies a marijuana cigarette. He told appellant that he wanted to buy fifteen 'joints'. Appellant then told 'Blood' to get fifteen marijuana cigarettes. (Rep. Tr. pp. 28-29.) Officer Tusan then gave Blood $7.50. 'Blood' got out of the car and walked east down the alley. (Rep. Tr. p. 29.)

"During the time that appellant was in the car, Officer Tusan got the name Clarence Blair. (Rep. Tr. p. 35.)

"When 'Blood' returned, he got back into the car. Officer Tusan started the car and proceeded back toward 5th and Crocker Streets. A few minutes after Officer Tusan started the automobile and

started to drive, 'Blood' leaned over toward the front seat and dropped some marijuana cigarettes into the front seat of the car. (Rep. Tr. p. 32.) 'Blood' at that time said that he wanted Officer Tusan to 'stash' them somewhere while he was taking them back to 5th and Crocker Streets because he didn't want the police to stop his car and find the marijuana cigarettes in his car. (Rep. Tr. p. 33.)

"Prior to getting out of the car, appellant pointed to a dark 1949 Chevrolet 4-Door, License No. LEX 199, which he said was the car that he was driving. Appellant said that he lived at 725 East 25th Street which was approximately one block from where they stopped to let 'Blood' out of the car to go and get the marijuana cigarettes. (Rep. Tr. pp. 34-35.)

"After the appellant got out of Officer Tusan's car, Officer Tusan went to the Police Administration Building, the Narcotics Division, and placed his initials on each one of the marijuana cigarettes, at which time he placed the marijuana cigarettes in an envelope and the envelope was sealed with sealing wax. (Rep. Tr. p. 36.) He then turned the envelope and its contents over to his supervisor, Sergeant Cunning, and arranged for transportation of the large envelope with its contents to the Property Division, where it was booked for

safekeeping. (Rep. Tr. p. 36.) A chemist, an expert in the field of marijuana testified that he chose five of the cigarettes at random, examined them chemically and microscopically, and was of the opinion they contained marijuana. (Rep. Tr. pp. 6-7, 14-15.)

"Officer Tusan testified before a secret hearing of the grand jury, and a secret indictment was issued as a result of this hearing. (Rep. Tr. p. 37.) Subsequent to this hearing there was a roundup of suspected narcotics sellers and pushers in the Los Angeles County area, and the appellant was one of those persons picked up during that roundup. (Rep. Tr. pp. 37-38.)

"Officer Tusan testified on cross examination that he found out that the appellant's name was Charles Blair at the time of the interrogation after he was taken into custody. (Rep. Tr. p. 54.) Officer Tusan at the grand jury indictment did not give the physical description of the appellant because the appellant was named. (Rep. Tr. pp. 55-56.) He testified that he knew appellant at the time of trial as Charles Blair. (Rep. Tr. p. 35.)

"On cross-examination Officer Tusan stated that when he testified before the grand jury, he thought that the appellant's name was Clarence Blair. (Rep. Tr. p. 59.)

"On January 25, 1960 Deputy Sheriff Ralph W. Becker, an expert in fingerprint identification, rolled appellant's fingerprints, and the card on which the fingerprints were placed was signed by the name of Charles Blair. (Rep. Tr. pp. 61-64.) He again rolled the appellant's fingerprints at the time of trial. (Rep. Tr. p. 65.)

"Deputy Sheriff Becker made a comparison of the fingerprints of the appellant which he had rolled on January 25, 1960 with the fingerprints appearing on the certifications of convictions from Missouri and California, and the fingerprint exemplar made at the time of trial. It was his opinion that they were all made by the same person. (Rep. Tr. pp. 61-26, 66-67.)

"Deputy Sheriff Becker testified that on the day of trial, when he was taking the appellant's fingerprints, the appellant said that he was guilty but he was going to let the jury decide. (Rep. Tr. p. 68.)"

SUMMARY OF ARGUMENT

The amendment of the indictment to show appellant's first name as Charles rather than Clarence is authorized by statute in the State of California. Such amendment related to a matter of form and not of substance. An amendment of this type is permissible under federal law.

No possible prejudice could have resulted to the appellant by the absence of counsel at the time of amendment. State court record shows that the amendment was made prior to arraignment and plea. The constitutional rule that a defendant is entitled to counsel at all stages of the proceedings does not require the reversal of a conviction upon a showing that at some particular stage counsel was not in attendance. There must be a showing that the lack of counsel resulted in prejudice to the rights of the defendant. Appellant cannot show prejudice in this case.

An evidentiary hearing by the district court as to appellant's claim of suppression of evidence was not required in this case because such claim was fully explored by the state trial court and adequately reviewed on appeal.

ARGUMENT

I THE INDICTMENT WAS PROPERLY AMENDED TO STATE APPELLANT'S TRUE GIVEN NAME AND HIS CONSTITUTIONAL RIGHT TO COUNSEL WAS NOT ABRIDGED

It is argued that appellant's constitutional rights were violated in that he was not represented by counsel at the time of the amendment to the indictment. The state court record shows that the indictment was amended on December 23, 1959, to show appellant's first name as Charles rather than Clarence, and that defendant

objected to this amendment. The state court record also shows that this amendment was prior to arraignment and plea (CT 4, 4a, 5).

Such amendment is authorized by statute. Section 953 of the California Penal Code provides:

> "When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being charged by the name mentioned in the accusatory pleading."

Section 989 of the California Penal Code relates to proceedings as to the true name of a defendant. This section provides:

> "When the defendant is arraigned, he must be informed that if the name by which he is prosecuted is not his true name, he must then declare his true name, or be proceeded against by the name in the accusatory pleading. If he gives no other name, the court may proceed accordingly; but if he alleges that another name is his true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the accusatory pleading may be had against him by that name, referring also to the name by which he was first charged therein."

Section 1009 of the California Penal Code authorizes an amendment without leave of court at any time before the defendant pleads or a demurrer to the original pleadings is sustained, and permits an amendment for any defect or insufficiency at any stage of the proceedings.

The appellant raised the present issue as to the amendment of the indictment on appeal from the judgment. The Second District Court of Appeal held that the contention was without merit and in connection therewith stated as follows:

> "Defendant argues that he was not sufficiently identified before the grand jury and that he was not the person who was indicted. The evidence herein recited is ample to identify defendant as the person who participated in, was indicted for, and was conficted of selling marijuana cigarettes to Officer Tusan. In the officer's testimony before the grand jury he used what he believed to be defendant's correct given name. Upon interviewing defendant he learned he was in error. Hence the amendment of the indictment to state his true given name. There is no question but that defendant was sufficiently identified before the grand jury.
>
> "Defendant complains that he was not represented by counsel when the indictment was amended to show

his true name. Defendant did, however, object to the amendment. But it is clear that defendant was not prejudiced in view of the provisions of Penal Code, section 953. The statement of the court in People v. Crooker, 47 Cal.2d 348, at page 353 [303 P.2d 753], is apposite on this point: 'To constitute deprivation of due process, however, the denial of the right of the accused to be represented by counsel in every stage of the proceedings must have so fatally infected the regularity of his trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice. [Citations.]' (See to the same effect Crooker v. California, 357 U.S. 433, 439 [78 S.Ct.1287, 2 L.Ed.2d 1448]; People v. Guarino, 132 Cal.App.2d 554, 557-558 [282 P.2d 538]; Lisenba v. California, 314 U.S. 219, 236 [62 S.Ct. 280, 86 L.Ed. 166].)" People v. Blair, 195 Cal.App. 2d 1, 7; 15 Cal.Rptr. 533.

The state appellate court correctly decided that the amendment did not prejudice the appellant. The constitutional rule that a defendant is entitled to counsel at all stages of the proceeding does not require the reversal of a conviction upon mere proof that at some particular stage counsel was not in attendance. There must be a showing that the lack of counsel resulted in prejudice to the rights of the defendant. This rule is

set forth in Crooker v. California, 357 U. S. 433, 78 S.Ct. 1287, 2 L.Ed. 2d 1448 The court in the recent case of Escobedo v. Illinois, ___ U.S. ___, 12 L.Ed. 2d 977, 84 S.Ct. ___, commented upon the Crooker case as follows at page 986:

"Crooker v California, 357 US 433, 2 L ed 2d 1448, 78 S Ct 1287, does not compel a contrary result. In that case the Court merely rejected the absolute rule sought by petitioner, that 'every state denial of a request to contact counsel [is] an infringement of the constitutional right without regard to the circumstances of the case.' Id., at 440, 2 L ed 2d 1454. (Emphasis in original.) In its place, the following rule was announced:

"'[S]tate refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, . . . but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of "that fundamental fairness essential to the very concept of justice. . . ." The latter determination depends upon all the circumstances of the case.' 357 US, at 439-440, 2 L ed 2d at 1454. (Emphasis added.)"

No possible prejudice could have resulted to the appellant by the amendment here in question or by the absence of counsel at the time of the amendment. As previously noted, the amendment was made prior to arraignment and plea, and the indictment was merely corrected to show appellant's true given name as Charles instead of the name of Clarence, the name originally listed on the indictment. Appellant has no constitutional right to be tried under an incorrect name. There seems to be some suggestion in appellant's brief that appellant was not sufficiently identified before the grand jury, or stated another way, appellant was not the person indicted. These arguments find absolutely no support in the state court record. The evidence shows that appellant was identified by Officer Tusan as the person who participated in the sale of marijuana cigarettes to him. Officer Tusan testified that at the time he testified before the grand jury he thought the appellant's name was Clarence Blair; that during the interrogation after appellant was taken into custody, he learned that his name was Charles Blair (RT 54). Thus, the amendment of the indictment to state appellant's true name was the logical and proper thing to do after his true name was ascertained by the officer. The evidence at the trial shows that appellant was sufficiently identified as the seller of marijuana cigarettes to Officer Tusan and the jury's determination

of guilt is adequately supported by the record.

It also appears to be counsel for appellant's position that to allow any amendment to an indictment violates the Fourteenth Amendment. The amendment of the present indictment relates to a matter of form and not of substance. Such amendment as to form is permissible under federal law In Dye v. Sacks, 279 F.2d 834, a habeas corpus proceeding by a state prisoner, it was held that an amendment to an indictment charging armed robbery by correcting a misdescription of a victim's name related to a matter of form and not of substance, and such amendment did not invade the petitioner's constitutional rights (United States v. Fawcett, 115 F.2d 764; United States v. Denny, 165 F.2d 668). It is submitted that an amendment which merely corrects an indictment to reflect a defendant's true name is a matter of form only, and does not prejudice the defendant.

II AN EVIDENTIARY HEARING BY THE DISTRICT COURT AS TO APPELLANT'S CLAIM OF SUPPRESSION OF EVIDENCE WAS NOT REQUIRED

It is argued that under the principles stated in Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745, the court below was required to hold an evidentiary hearing on appellant's claim that evidence had been suppressed in erasing a certain tape recording of an interview with the appellant following his arrest.

In the Townsend case, it was held that in a

habeas corpus proceeding instituted by a state prisoner, a federal court must grant a hearing if (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the applicant a full and fair fact hearing.

The state court record shows that there was a tape recording of an interview with the appellant after he was taken into custody. The statements at trial as to appellant's demand for the tape, the reasons therefor, and the erasure of the tape are as follows:

"MR. ARIEY. My client would like to say something to the Court. The jury is not present.

"THE COURT: Any members of the jury on the Charles Blair matter present in the courtroom?

"I hear no answer, and I don't see any.

"THE BAILIFF: They are all upstairs.

"THE COURT: People versus Charles Blair.

"Let the record show that the defendant is present, together with his counsel, Mr. Ariey.

"Mr. Rowen is present, representing the People

"What do you wish to say, Mr. Blair?

"THE DEFENDANT: Judge, your Honor, this is about my case, concerning the facts I have, concerning my innocence I'd like to say that at the last minute yesterday the only evidence that I have to prove my innocence have been dismissed, or something, and that is the tape recording in this case. The tape recording in this case will definitely show that I am not Clarence Blair.

"THE COURT: How will it show it, except your own statements?

"THE DEFENDANT: That I am not Clarence Blair I haven't committed no crime or nothing. This was taken down by the officers

"THE COURT: That would not be admissible. Any self-serving statement which you deny would not be admissible

"THE DEFENDANT: But the fact is this: When I was picked up this officer on the stand had me there asking me was I Clarence Blair and did I know John Doe Blood, and the fact that --

"THE COURT: You can testify to that.

"THE DEFENDANT: I know I can testify, but my testimony against this officer's testimony don't mean

anything. I've got proof of my innocence and I'd like to have that tape recording I'd like to have the tape recording that they say they aren't going to have in this case

"THE COURT: How do you feel about it, Mr. Ariey?

"MR. ARIEY: I am confused I was told by Officer Tusan's superior officer that they had erased the tape and that it doesn't exist now; that the interview was taken down by tape recording and they subsequently erased the tape.

"THE COURT: Will Mr Tusan testify to that?

"MR. ARIEY: Yes. He said so.

"THE COURT If they don't have the tape recording, then they can't bring it into court." (RT 81-82.)

Thereafter testimony was given as to the erasure of the tape. Sergeant Cunning testified that the tape was erased on February 22, 1960,* along with other tapes of interviews in order that the tapes could be reused (RT 91, 92), and that an additional reason for the erasure was that the tape consisted of self-serving declarations of the appellant (RT 94). The testimony shows that the erasure was done in the ordinary course of business pursuant to instructions of a superior officer (RT 92, 96).

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* The recording was made December 22, 1959. (RT 96.)

This issue was before the state appellate court and was decided adverse to the appellant. The court stated in People v. Blair, 195 Cal.App.2d 1, 15 Cal Rptr 533, at page 8

"Defendant argues that the People suppressed the tape recording of the interview the officers had with him after his arrest; that this interfered with the preparation of his defense, and prevented him from having a fair trial

"The intentional suppression of material evidence by the State would, of course, be a denial of a fair trial and due process. (People v. Kiihoa, 53 Cal.2d 748, 752 [3 Cal Rptr. 1, 349 P.2d 673].) But the erasure of the tape here in question does not appear to have been done intentionally for the suppression of evidence. The testimony shows that the department was short of tapes and ordered eight or ten tapes erased so that they might be available for reuse. This was done in the usual course of business and pursuant to instructions from a superior officer. After hearing the entire matter explored, the trier of fact impliedly came to the conclusion that erasing the tapes was done in good faith and not for the purpose of suppressing material evidence. The evidence sustains such an implied finding. Clearly, the erasure of the tape did not prevent

the defendant from having a fair trial."

The above statements of the appellate court together with the state court record showed that all evidentiary features pertaining to the erasure of the tape were explored The evidence shows that the erasure of the tape did not prevent appellant from having a fair trial and nothing was contained therein that could have in any way aided in the preparation of his defense. Inasmuch as the evidentiary aspects of this claim were completely explored at the trial court level and such matters were fully disclosed in the appellate court opinion, the federal district court was not required to grant an evidentiary hearing on this claim

CONCLUSION

It is respectfully submitted that the judgment of the court below be affirmed

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EDSEL W. HAWS